(3)

Supreme Court, U.S.
FILED
JUN 4 - 2003
OFFICE OF THE CLERK

No. 02-1545

In The
Supreme Court of the United States

CLEM ABRAMS and JOHN BOHANNON,

Petitioners,

v.

CITY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal
For The State Of California
Fourth Appellate District

PETITIONERS' REPLY BRIEF

LOUIS E. GOEBEL
Counsel of Record
LAW OFFICES OF LOUIS E. GOEBEL
2445 Fifth Avenue, Suite 410
San Diego, CA 92101
Telephone: (619) 239-2611

Attorney for Petitioners
Clem Abrams and John Bohannon

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

11pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE COST REIMBURSEMENT DISTRICT IN THIS CASE DID NOT "SANITIZE" THE TAKING OF PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION 2

II. THE THIRD LIEN INCREMENT OF THE COST REIMBURSEMENT DISTRICT IN THIS CASE RESULTED IN AN OUTRIGHT CONFISCATION OF PETITIONERS' PROPERTY.... 3

III. RESPONDENT CITY SHOULD NOT BE HEARD TO BLOW HOT AND COLD ON THE NOTION OF "SPECULATION."..... 5

IV. RESPONDENT CITY'S ARGUMENTS REGARDING ACCESS TO PETITIONERS' PROPERTY ARE INACCURATE 6

V. THE FACT THAT THE COURT OF APPEAL OPINION IS UNPUBLISHED DOES NOT MITIGATE THE FEDERAL QUESTION..... 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

CALIFORNIA:

Ehrlich v. City of Culver City, 12 Cal.4th 854 (1996).....1, 2

White v. County of San Diego, 26 Cal.3d 897 (1980)..... 2

FEDERAL:

Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994).....1, 2

Federal Deposit Insurance Corp. v. City of New Iberia, 921 F.2d 610 (5th Cir. 1991)..... 3

Nollan v. California Coastal Comm., 483 U.S. 825 (1987).....1, 2

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)..... 8

OTHER AUTHORITIES:

United States Constitution, Fifth Amendment 1, 2, 5, 6, 7

San Diego City Council Policy 200-1 4

INTRODUCTION

Though decidedly detailed and erudite, Respondent City's Brief in Opposition entirely fails to negate the fact that what happened in this case with the purported third lien increment of the purported cost reimbursement district was that, in a pre-calculated plan, Respondent City took back the just compensation it only recently "paid" Petitioners for the right of way it took from the middle of Petitioners' parcel, in violation of Petitioners' Fifth Amendment rights.

Respondent City's Brief entirely ignores the fact that Petitioners, unlike the Petitioners in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), were merely holding property, and were specifically not applying for any sort of permission to develop it which would give rise to the normal procedure of Respondent City, which is to exact such rights of way as a condition of development.

Because exaction was not available as a vehicle to take the right of way without compensation, Respondent City improperly and in violation of its own policies with respect to rights of way which require consideration of local and regional use by the public in addition to the adjacent property owners, used the third lien increment to accomplish the same goal, to wit: to take Petitioners' land without paying for it.

That is the crux of this case:

May a public agency exercise eminent domain powers to take real property interests without compensation on

the basis of "benefit" or take real property with compensation, but then "assess" back the acquisition cost to the property owner through a cost reimbursement district as a "benefit," based on a case such as *White v. County of San Diego*, 26 Cal.3d 897 (1980), thereby ultimately acquiring the real property without compensation to the property owner?

I. THE COST REIMBURSEMENT DISTRICT IN THIS CASE DID NOT "SANITIZE" THE TAKING OF PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION.

Respondent City argues at several points in its brief that Special Assessment Districts such as the Cost Reimbursement District in this case are permissible and are legislative action, such that somehow they "sanitize" exactions and takings from the level of scrutiny under the Fifth Amendment to which eminent domain or exactions as to specific development project proposals are subjected.

As an initial matter, it is technically accurate to state that the taking in this case was not an "exaction" in the *Nollan*, *Dolan*, *Ehrlich* sense because Petitioners were not applying for development of their property for which mitigation efforts of any sort would be appropriate. The third lien increment was a taking nonetheless, all the more egregious because Petitioners were innocent bystanders, apparently in the way of development progress.

An analogy to this case would have been if, in *Nollan*, rather than telling Mr. Nollan that he could not build his home unless he dedicated five feet for public coastal access, the relevant public agency had, in the absence of any development proposal, condemned the five foot access,

"paid" Mr. Nollan for it, and then assessed Mr. Nollan for the cost of the access. The net effect is the same, to wit: a taking without compensation.

II. THE THIRD LIEN INCREMENT OF THE COST REIMBURSEMENT DISTRICT IN THIS CASE RESULTED IN AN OUTRIGHT CONFISCATION OF PETITIONERS' PROPERTY.

At pages 11 and 12 of its Brief in Opposition, Respondent City cites authority for the general proposition that abutting owners may be constitutionally subjected to special assessments to meet the expenses of opening public highways in front of their properties.

At 12, Respondent City cites *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610, 615 (5th Cir. 1991) for its "holding that special assessments are founded upon special benefits and that local tax assessments are constitutional **unless they amount to such an abuse as to be an outright confiscation of property**." (Emphasis added.)

Here, that is exactly what the third lien increment amounted to. Respondent City "paid" Petitioners for the significant portion taken from the middle of their property as right of way through eminent domain, on the one hand, while assessing Petitioners for the same cost on the other. The mere fact that this taking was buried in the middle of an otherwise facially appropriate "special assessment" involving "special benefits" to Petitioners' property, asked for or not, should not be held to insulate it from constitutional scrutiny.

Here, Respondent City assessed approximately $1,000,000.00 on Petitioners in the absence of any development proposal whatsoever, and then sought to add over $500,000.00 more, based primarily on the fact that Petitioners sought to be compensated for the significant portion of their property that was being taken exclusively for road right of way which was not, as Respondent City implies, for Petitioners' benefit, but rather in large part was for the benefit of the general public, locally and regionally. That is why Petitioners suggest that traffic analysis is appropriate when evaluating rough proportionality.

Respondent City does not even discuss its Council Policy number 200-1, mentioned in the Petition at page 23, which describes the policy to be considered in allocating the expense of street construction:

1. Streets which facilitate the movement of through traffic, or serve in a collector function and are of benefit to the general area as to which, pursuant to Council policy number 200-1, "this community should share in the costs" or

2. Features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City which, pursuant to Council policy number 200-1, "merit funding from tax sources."

In this instance, Respondent City aggregates the expenditures on Westview Parkway and Galvin Avenue so as to obscure the fact that the third lien increment was confined to Petitioners' property and was almost exclusively composed of recoupment of the compensation paid for the right of way through the eminent domain case.

It was this recoupment that made the condemnation into a taking in violation of Petitioners' Fifth Amendment rights.

III. RESPONDENT CITY SHOULD NOT BE HEARD TO BLOW HOT AND COLD ON THE NOTION OF "SPECULATION."

Respondent City asserts, at 18, that Petitioners' suggestion that use of traffic study information for the evaluation of relative benefit to Petitioners' property as compared to neighboring properties and the local and regional general public somehow involves "speculation."

It seems incongruous for Respondent City to assert on the one hand that such traffic analysis, based on the highest and best currently possible use for Petitioners' property would be "speculative" and then to assert, at page 21, that use of the Rick Engineering projected costs of development of Petitioners' property and use of Randy Tague's appraisal information constituted substantial evidence in support of rough proportionality.

As an additional matter, this Court, when it sees the record, will see everything Respondent City's City Council and the state Courts saw, as there were virtually no live proceedings and such proceedings as did occur, did not involve evidence. Because of that, deference to the state Courts on issues of fact is not necessary.

IV. RESPONDENT CITY'S ARGUMENTS REGARDING ACCESS TO PETITIONERS' PROPERTY ARE INACCURATE.

Respondent City asserts, at page 23, that Petitioners "only bear responsibility for the portion of the street that provides *direct access* to their property." (Emphasis City's.) What Respondent City is actually stating is its unwritten policy that a property owner is to pay the full cost of any street right of way and/or improvement that abuts or crosses his or her property. In other words, access **past** or **through** the property, not just access **to** the property.

Respondent City then feigns surprise, at page 25, at the suggestion that the alignment of Westview Parkway and Galvin Avenue was designed to shift the street onto Petitioners' property. Respondent City does admit, however, that it had determined that Petitioners would bear the cost of the portions of Westview Parkway and Galvin Avenue on their property.

Put another way, in developing areas, Respondent City takes the position that anyone abutting a right of way should dedicate land sufficient to permit the building of a street. If the right of way happens to trisect your property, you are viewed as being responsible for the entire cost of the right of way taken from your property, including the costs of condemning it. This view seemingly eviscerates the law of eminent domain, and would seem to be in direct conflict with one's Fifth Amendment rights, yet it is ingrained in the culture in Respondent City to the point where Respondent City appears unable to recognize that its net effect is to effectuate a taking of real property without compensation.

Having now been caught with its hand in the proverbial cookie jar, Respondent City now seeks to put a "spin" on this, at page 24, to the effect that it is seeking reimbursement for the cost of "those portions of Westview Parkway and Galvin Avenue necessary to provide access to their property." What this means in Respondent City's vernacular is that it sought reimbursement for the **entire cost of the right of way as it trisected Petitioners' property**, not just a proportional cost of access **to** Petitioners' property.

V. THE FACT THAT THE COURT OF APPEAL OPINION IS UNPUBLISHED DOES NOT MITIGATE THE FEDERAL QUESTION.

In this day and age, whether we like it or not, unpublished cases can be as important as published cases. This case is an example. Absent intervention by this Court, Respondent City, and similarly situated public agencies will have apparent *carte blanche* to condemn rights of way for public purposes, and then assess back the full cost of acquisition to the condemnee based on the assumption of "roughly proportional benefit," which was never asked for by the property owner. One of the rights included in the property owner's "bundle of sticks" is the right to be left alone – to not have its property committed, and physically taken, by government, without full compliance, before taking, with the Fifth Amendment requirements, and with the *Nollan-Dolan* requirements. The concept of "benefit," particularly an unrequested "benefit" does not appear in either.

If this is the proper approach, there should be a Federal case confirming it, so that persons such as Petitioners will know the extent of their rights as property

owners in the path of development. If, as Petitioners suspect, this approach does not pass constitutional muster, a published case would be societally beneficial, to force public agencies to more appropriately spread the cost of public improvements among the public rather than, as here, putting it on the backs of a few property owners who just happen to be in the path of land development.

The Court's attention is again invited to *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001):

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

CONCLUSION

The Court should grant the petition for a writ of certiorari in this matter.

Dated: June 4, 2003

LAW OFFICES OF LOUIS E. GOEBEL

LOUIS E. GOEBEL
Attorney of Record for Petitioners
Clem Abrams and John Bonannan